No. 22218

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

vs.

UNION BANK, a Corporation,

Appellee.

On Appeal From the United States District Court
for the Central District of California.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction.

The statement of Jurisdiction in Appellant's Brief is accurate.

Statement of the Case.

The facts which give rise to this cause are as follows:

On January 6, 1967, Marquerite M. Buckley, a female lawyer employed in the Law Division of Union Bank since 1962, resigned her position as Assistant Counsel for the purpose, as she stated in writing, of "seeking other employment" [T. R.* 9].

On February 20, 1967, Miss Buckley filed a Charge of Discrimination because of her Sex with the Equal

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*"T. R." refers to the Transcript of Record.

Employment Opportunity Commission [T. R. 6]. On the form Charge, Miss Buckley stated the discrimination to be

> "Discrimination in upgrading on the job; men doing the same job had corporate titles and higher salaries. In September of 1965, I submitted my resignation to my superior, J. O. Wood, General Counsel, based on discriminatory practices with respect to title and salary. I withdrew it on his promise to remedy the matter. In August of 1966, a new man who had no legal experience and had just passed the California State Bar was given a higher title. All male attorneys now had the title of associate counsel although we were all doing the same work. Again, promises were made to remedy the situation. On January 6, 1967, I submitted my resignation because nothing had been done over 1½ years." [T. R. 6].

On March 8, 1967, the Commission served the Bank with a copy of the Charge [T. R. 13]. An Investigator of the Commission interviewed on that date Mr. Nachreiner, Executive Vice President, and also Mr. Wood, the General Counsel of the Bank [*Ibid.*].

On March 16, 1967, the Investigator interviewed, for three hours, Mr. William Blakely, the Vice President in charge of Personnel, as well as Mr. Sanders, the Vice President in charge of the personnel of the Law Division [*Ibid.*].

On March 21, 1967, the Investigator again interviewed Mr. Sanders, this time for one and one-half hours [*Ibid.*].

On April 4, 1967, the Investigator interrogated, without previous appointment, an employee of the Bank [*Ibid.*].

On April 5, 1967, the Investigator requested a "tour" of each physical area in the Bank's headquarters and in each of the Bank's Los Angeles offices where both males and females work [T. R. 15].

On April 6, 1967, the Investigator again interviewed Mr. Wood [T. R. 13].

On April 10, 1967, the Investigator interviewed Messrs. Ladner, Korngut and Broidy of the Bank [*Ibid.*].

Pursuant to the request of the Investigator, the Bank has supplied [T. R. 7, 13, 14] to the Commission, among other documents and oral information, the following:

(1) Employer Information Report for the 2,198 employees of the Bank, broken down by Sex, Minority Group and Occupation, *but without identification by name.*

(2) The complete personnel files of Miss Buckley and her contemporaries in the Law Division.

(3) The Law Division Organizational Chart.

(4) The Law Division Job Specification.

(5) The Payroll Department cards of Miss Buckley and of her contemporary male lawyers.

(6) IBM tab run for March, 1967 reflecting statistics of attorneys in the Law Division.

(7) Memorandum of Mr. Korngut regarding Miss Buckley's performance.

(8) Memorandum Re Minority Groups Employment.

(9) Pamphlet Re Employee Relations and Practices.

(10) Example of litigation case handled by Miss Buckley.

The Bank suggested to the Investigator that he obtain Miss Buckley's permission to interview her psychiatrist who has attended her for several years and also to interview the psychologist who rendered a report to the Bank concerning Miss Buckley [T. R. 14]. The Commission evinced no interest in doing so.

On March 16, 1967, the Investigator had requested to see an IBM Tab Run setting forth the *names,* as well as sex, salary, job and title of the Bank's 2,198 employees [T. R. 14]. The Investigator admitted then to Mr. Sanders that the request was in the nature of a "fishing expedition" [T. R. 14].

On March 21, 1967, the Investigator repeated his request for the Tab Run, stating that he needed the names and addresses therein of the 2,100 or more Bank employees so that he could interview whomsoever among them he chose [R. T. 14]. The Bank declined [T. R. 14] by letter dated March 23, 1967 [R. T. 7-9].

On March 31, 1967, the Commission formally demanded [T. R. 8] two additional types of documents:

(1) The IBM Tab Run reflecting not only jobs, salaries and titles by sex, but also the names of the 2,198 employees of the Bank.

(2) "All other records" which would enable the Commission to determine whether or not there was probable cause for the Commission to believe the Bank discriminated against Miss Buckley.

The Bank declined to produce these documents for the reasons stated in its letter of April 4, 1967 [T. R. 10], and petitioned for an Order quashing the Demand. An Order was obtained from the District Court quashing the Demand for both categories of documents [T. R. 50-51].

Although the Commission has appealed from the entire Order, it has not argued in its Brief that the Court's quashing of the second Demand was error. That all-inclusive second Demand would require the Bank to determine what the Commission would consider to be evidence of probable cause. Since that second Demand is so patently improper, we assume that the Commission no longer is contending that portion of the District Court's Order is error.

Here, there were seven or eight highly educated persons practicing their profession in a Law Department. How bank practices with respect to clerks or typists would be of consequence to whether a female lawyer was discriminated against requires considerable imagination.

Suppose a female lawyer in a regional law office of General Motors complained of sex discrimination. Would the law consider as "relevant" what G.M.'s practices were with respect to all its female employees *vis a vis* their male counterparts? Should the Commission be entitled to interrogate each of G.M.'s employees? In a private suit by such a lawyer, could she *depose each employee* of G.M. in an effort to prove that a "pattern of action" could be

> "drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole"? (Appellant's Brief p. 8).

Or, if a law clerk of this Court alleged discrimination on account of his or her sex, would the employment practices of the Federal Government as to all of its employees become "relevant to the charge"?

We submit that if the foregoing questions are answered negatively, the Order of the District Court must be affirmed. Conversely, if the Order is reversed, this Court would be setting a precedent for the broadest possible scope of investigation of charges similar to that of Miss Buckley.

Indeed, it may be that all the Commission seeks in its appeal is just such a precedent, for as it admitted below:

> "The Commission does not contend . . . that the data print-out sheets will prove or disprove Miss Buckley's charge." [T. R. 31].

It should be noted, moreover, that the requested data itself would supply the Government with little, if anything, more than it already has from the Bank by way of statistics. Not only did the Bank submit statistical information to the Commission about its 2,198 empoyees by sex, by occupation and by minority group [R. T. 17], but as the Commission also admitted below,

> "information similar to that contained on IBM data processed sheets would be routinely supplied by the Bank to numerous federal agencies . . ." [T. R. 12].

Hence, if the Commission has any true use for the IBM Tab run, it will be in order to obtain the *names* thereon of the Bank employees. The evidence before the District Court was that the Commission's Investigator stated he needed the data in order to get the names and addresses so that he might interview whomsoever he chose and engage in a general "fishing expedition" into the general employment practices of the Bank [T. R. 14].

In the light of the evidence before the District Court, it is difficult to see how it erred in quashing the Demand of the Commission.

2. The Demand Is in Excess of the Commission's Jurisdiction.

Before there can be any charge filed with the Commission, any complainant first must exhaust his State remedies. As stated in 42 U.S.C. § 2000e-5(b):

> "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law."

California Labor Code § 1197.5 is such a State Law. It provides

> "(a) No employer shall pay any female in his employ at wage rates less than the rates paid to male employees in the same establishment for the same quantity and quality of the same classification of work; provided, that nothing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties

> or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, factor or factors other than sex, when exercised in good faith."

Section 1197.5(b) makes the violating employer liable to the female employee; § 1197.5(c) requires the Division of Industrial Welfare to administer the Section; § 1197.5(f) provides for a civil suit by the Division; § 1197.5(i) allows the female a civil action; § 1199(d) makes the employer's violation a criminal offense.

The activity complained of by Miss Buckley was exactly that prohibited by § 1197.5 (a). Miss Buckley's charge stated:

> "Discrimination in upgrading on the job; *men doing the same job* had corporate titles and higher salaries." [T. R. 6].

Yet, there was no showing of exhaustion of any State remedy. Moreover, the Charge itself affirmatively states it was filed less than 60 days after her resignation was submitted [T. R. 6].

Hence, the Commission exceeded its jurisdiction by entertaining the Charge before complainant exhausted her State remedies.

3. The Demand Is an Unwarranted Intrusion Into the Privacy of the Bank's 2100 Employees and an Unreasonable Interference With the Business of Petitioner.

What would make the Demand an "unwarranted intrusion" or an "unreasonable interference"? If the charges of Miss Buckley were utterly baseless, that fact would make it unreasonable for the Commission further to interview Bank employees and thus interfere with the employees as well as the Bank. What showing can the Bank make regarding Miss Buckley's charges?

The most helpful and relevant precedent to cite to this Court is a Decision in a case before the California Unemployment Appeals Board, No. BK-5697, Burbank Field Office, dated 6-16-67. This case concerned whether Miss Buckley was disqualified for benefits under § 1256 of the California Unemployment Insurance Code because she left her most recent work voluntarily without cause. If there had been a violation by the Bank of § 1197.5 of the Labor Code, there would have been sufficient good cause for Miss Buckley to have left the Bank without being barred from benefits. However, the Referee ruled against Miss Buckley's claim of discrimination, stating:

> "The claimant was employed first as a Law Administrator. She was then promoted to Assistant Counsel. She resigned in August 1965 because the employer had not promoted her to Associate Counsel. The employer induced the claimant to withdraw her resignation because she was com-

petent and skilled in the field of establishing and supervising procedures for loan documentation.

"The employer at that time promised the claimant that she would be considered for promotion to Associate Counsel. The employer kept that promise. On February 9, 1966, the Vice-President who was the claimant's supervisor recommended that she be promoted to Associate Counsel. The claimant knew that her selection must be approved by the Board of Directors. The Board of Directors did not approve her promotion to Associate Counsel. In good faith, however, the employer had considered the claimant for promotion, as was promised to her in August 1965. She then received a pay increase of $600 per annum. There is not evidence that the claimant was given any definite and specific promise which the employer later did not keep.

"The evidence does not establish that the employer in any way discriminated against the claimant because of her sex. The referee after considering the demeanor of the witnesses, their manner of testifying, the character of their testimony, the capacity of the witnesses to recollect and their possible bias, interest or motives, finds that any distinction in grade, title, conditions of employment, or rate of pay between the claimant and the other attorneys of the law department of the employer was based upon their relative ability, seniority, skill, difference in duties or services performed. Any such distinction between the claimant's working conditions, title or rate of pay and the working conditions, titles or rates of pay of

the other attorney members of the employer's law division was based upon a reason other than the fact that the claimant is a female and the other attorney employees are of the opposite sex. The skill, effort and responsibility of the claimant was not equal to the skill, effort and responsibility of the other attorney employees of the employer.

"Consequently, the referee concludes that the claimant quit her job because of her basic dissatisfaction with her progress as an employee. Her progress, or the lack thereof, was not connected in any way with the fact that she is a female. The claimant has not established a real, substantial and compelling reason for quitting her work of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action. The claimant quit her work without 'good cause' within the meaning of section 1256 of the code."

We believe that the foregoing decision is adequate precedent to show that further investigation of Miss Buckley's charge would be useless and unnecessary and thus an unwarranted intrusion into the privacy of the Bank's employees and an unreasonable interference with the business of the Bank.

Conclusion.

This Court stated in *Lee v. Federal Maritime Board,* 284 F. 2d 577, 581 (9 Cir. 1960),

"An administrative subpoena may be held unenforceable on the ground that the data called for is irrelevant to the purposes of the inquiry."

This Court gave as authority, *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1945). We can find no more fitting a summation of the point involved herein than Justice Murphy's dissenting opinion therein:

> "Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who 'sent hither swarms of officers to harass our people.'
>
> "Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.